No. 82-914

IN THE

# Supreme Court of the United States



October Term, 1982

MONSANTO COMPANY,

*Petitioner,*

*vs.*

SPRAY-RITE SERVICE CORPORATION,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

## BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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## Question Presented.

Whether the long-accepted rule that deems vertical price fixing to be per se unlawful under Section 1 of the Sherman Act should be abandoned.

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## BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

### Interest of the Beverly Hills Bar Association.

Pursuant to the written consent of the parties,[1] Amicus Curiae Beverly Hills Bar Association herewith submits its brief in support of Plaintiff/Respondent Spray-Rite Service Corporation ("Spray-Rite").

The Beverly Hills Bar Association is a voluntary organization of over 2,200 lawyers, judges and law professors located principally in the western portion of the County of Los Angeles, California. Since its founding in 1932, the Association has had as one of its primary goals promotion of the efficient administration of justice in the California and federal courts. It is this goal which brings the Asso-

[1]Consent from counsel for both parties has been filed with the Clerk of this Court, pursuant to Rule 36.2 of the Rules of the Supreme Court.

ciation to the bar in this case.

Unlike most, if not all, of the other *amici* in this matter, the Association is *not* a party with pecuniary or parochial interest in the outcome. Rather, the Association is composed of attorneys who represent all types of clients, large and small, corporate and individual, defendants and plaintiffs, in the widest range of matters, and other attorneys who represent no particular clients, but whose general views are consonant with the general public's. Also, a substantial number of the Association's members are actively involved in antitrust litigation and counseling. In this role, some of our members must explain the arcana of antitrust to the business community and must deal, at the most practical level, with the constant struggle to maintain compliance with the antitrust laws at the highest level and keep litigation manageable when resort must be taken to that arena.

In short, our principal interest is in the efficient administration of justice in antitrust matters. The evolution of the legal standard for construing the Sherman Act can have a major impact on this interest. At issue here is the continued vitality of this Court's long-standing per se rule against vertical price fixing (or "resale price maintenance"). The per se rule is at issue — although the Court did not explicitly certify this question — primarily because the Antitrust Division of the United States Department of Justice has sought to make this the forum for debating and discarding the per se rule against vertical price fixing.[2]

The Association thus has a substantial interest in the preservation of the rule to the extent it promotes clarity, predictability and efficiency and further to the extent it continues to promote free competition between sellers

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[2]Brief of the United States as Amicus Curiae in Support of Petitioner (hereinafter "Brief for the United States"), at 19-29.

in the marketplace. Faced with the extraordinary intervention of the Department of Justice, in support of Defendant/Petitioner, to undermine the per se doctrine, the Association sees its duty now as defending this Court's existing rule against vertical price fixing.

**Summary of Argument.**

1. This Court's per se rule against vertical price fixing is the product of 70 years of judicial experience, antitrust scholarship, and clear expressions of Congressional approval. The burden is great on those who now urge abandonment of the rule.

The manageability of antitrust law and litigation is an issue of major importance today in the Nation's legal and business communities. The per se rule provides a clear, logical and manageable standard for those communities, and thus promotes the efficient administration of justice in antitrust matters.

Moreover, the rule enjoins only the most competitively restrictive practice and one virtually never supported by any legitimate rationale provided by price fixers or by their defenders. Abandonment of the per se rule will plunge the courts, counsel and the business community into constant uncertainty about one form of price fixing and will almost certainly open the way for some suppliers to practice the most restrictive available means of control over their distributors.

2. Congress has recently expressed direct approval of the per se status of vertical price fixing in its 1975 repeal of the "fair trade" laws. In that context, Congress reviewed vertical price fixing activities and considered "reasonable" exceptions to the per se rules. Congress instead chose complete repeal of "fair trade" and consciously and overwhelmingly returned the law to the pre-existing rule of per

se illegality.

The proposal by the Department of Justice that the per se prohibition against vertical price fixing be abandoned also constitutes a dramatic shift of its own historical policy. This would work sweeping and controversial changes in the practical operation of the Sherman Act as the public's principal protection against anticompetitive practices. As such, the proposal is essentially legislative in nature and should properly be addressed to Congress, the body responsible for establishing this nation's antitrust policies.

## ARGUMENT.

### I.

### THIS COURT'S FIRMLY ESTABLISHED PER SE RULE AGAINST VERTICAL PRICE FIXING PROMOTES THE EFFICIENT ADMINISTRATION OF JUSTICE IN ANTITRUST MATTERS.

### A. The Per Se Rule Against Vertical Price Fixing Is Firmly Established and Should Not Lightly Be Abandoned.

This Court noted in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), that the per se rule against vertical price fixing has been "established firmly for many years,"[3] echoing the Court's prior conclusion in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), that it is a "long-accepted rule in Section 1 cases that resale price fixing is a per se violation of the law."[4]

The government readily acknowledges the present status of the rule,[5] but claims that this Court has never analyzed vertical price fixing to determine if "the practice reduces output, retards innovation, or otherwise interferes with Sherman Act goals."[6] The government takes the view that the per se rule consists, in its essence, of the 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and 70 subsequent years of empty presumptions, devoid of "any occasion to look carefully at the actual competitive effects of resale price maintenance."[7]

In fact, quite to the contrary, the per se rule is supported by Court findings and analysis in a long line of decisions

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[3]433 U.S. at 51, n.18.
[4]390 U.S. at 151.
[5]Brief for the United States, at 19-20.
[6]*Id.* at 21.
[7]*Id.* at 19, n.27.

beginning even before *Dr. Miles Medical* and reaching to the present day.[8]

Far from devoid of analytical content, these decisions have identified at least five different reasons justifying per se treatment of vertical price fixing. These include:

(1) the similarities of intent in vertical price fixing and horizontal cartel activity,[9]

(2) common law principles of restraint of trade,[10]

(3) the impermissible interference with price, the "central nervous system" of the economy,[11]

(4) the effect of vertical price fixing in facilitating manufacturer or retailer cartels[12] (an effect conceded by Professor (now Judge) Posner, on whom the government relies heavily[13]), and

(5) the recent Congressional approval of the per se rule in repealing the "fair trade" laws.[14]

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[8]*See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Bauer & Cie v. O'Donnell*, 229 U.S. 1 (1913); *Boston Store of Chicago v. American Graphaphone Co.*, 246 U.S. 8 (1918); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) ("Undesirable-Price Cutters" program unlawful on its face); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951) ("Fixing minimum [resale] prices, like other types of price fixing, is illegal *per se*.") *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

[9]*Dr. Miles Medical, supra*, 220 U.S. at 408.

[10]*Id.* at 406.

[11]*Albrecht, supra*, at 154 (Douglas, J., concurring) ("A fixing of prices for resale is conspicuously unlawful because of the great leverage that price has over the market", citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)).

[12]*White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan, J., concurring) (vertical price fixing "almost invariably does in fact reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands.").

[13]See, Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1975), noting that "industry-wide resale price maintenance might facilitate cartelizing."

[14]*Sylvania, supra*, at 51, n.18.

Similarly, antitrust scholars have voiced widespread, although admittedly not unanimous, support for the per se rule in this context. Professors Sullivan,[15] Pitofsky,[16] Areeda and Turner[17] are among the prominent and respected scholars[18] who have published views supporting the per se rule. The common theme in these cases and commentaries is that price is the critical variable in our competitive system, and thus, there is imbedded in our antitrust law and policies a heavy presumption against interference with price.

A full-scale substantive analysis of these views is offered by other *amici*,[19] so it will not be duplicated here. For present purposes, the significance of this consistent history of per se treatment is twofold:

(1) The per se rule against vertical price fixing is the product of 70 years of judicial experience, antitrust scholarship, and at least one recent expression of Congressional approval, not some unquestioned and conclusory "received learning", as the government implies.[20] Although the rule has recently had its critics among a group of economists representing one end of the continuum of economic thought, which may now be in vogue, it is nevertheless well sup-

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[15]L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST (1977) at 377-399.

[16]Lifland, Pitofsky & Popofsky, *Advising Clients On Vertical Restraints*, 51 ANTITRUST L.J. 50, 51-52 (1982) [hereinafter cited as Pitofsky].

[17]*See*, 3 P. Areeda & D. Turner, ANTITRUST ANALYSIS, Section 828d (1978); *see also*, Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

[18]*E.g.*, Reich, *The Future of Unfair Methods of Competition*, 50 ANTITRUST L.J. 801, 805-806 (1982).

[19]*See, e.g.*, Brief for Amicus Curiae National Association of Attorneys General in Support of Respondent.

[20]Brief for the United States as Amicus Curiae (Petition for Writ of Certiorari), at 17.

ported and precedented.

(2) The burden is great on those who would abandon this firmly established rule, perhaps greater than it would be on the opponents of most such lasting rules. Any such change should not be undertaken lightly or hastily.

**B. The Per Se Rule Provides a Clear and Manageable Standard for the Legal and Business Communities.**

The manageability of antitrust law and litigation is an issue of paramount importance today in the Nation's legal and business communities. In 1977 the National Commission for the Review of Antitrust Laws and Procedures (NCRALP) was formed to develop recommendations for improving the antitrust laws and the management of antitrust litigation, in response to recognition of the problem of "the complex . . . multiyear, sometimes multimillion dollar phenomenon" of the civil antitrust case.[21] The Commission later concluded that many antitrust cases "absorb enormous resources and time" and further found that:

> [U]ndue delay is a serious problem in a significant number of complex antitrust cases. The resulting burdens on litigants and the courts are great. Excessive public and private resources are needlessly expended; confidence in antitrust enforcement and the judicial process is weakened; and effective enforcement is impeded . . . . In short, the overall effectiveness of the antitrust laws in promoting a competitive economy is impaired.[22]

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[21]National Commission for the Review of the Antitrust Laws and Procedures, Report to the President and the Attorney General (Jan. 22, 1979) at 4 [hereinafter "NCRALP Report"]; *See also*, Exec. Order No. 12022, Sections 2(a)(1)-2(a)(2), 3 C.F.R. 155, 156 (1977).

[22]NCRALP Report, *supra*, at 3-4.

The recent 13-year action of *United States v. International Business Machines Corp.*, No. 69 Civ. 200 (S.D.N.Y. filed Jan. 17, 1969) is merely the most visible example, among scores of cases, of the morass that antitrust litigation can become.[23] This potential for enormously complex and protracted litigation puts a premium on efficiency in the antitrust process. No one suggests that abandonment of per se rules will do anything but make that potential even more often the reality.

Per se rules play a key role in insuring the manageability of the antitrust laws. Professors Areeda and Turner state:

> [T]hat rule [of per se unlawfulness for price fixing] rests on various judgments about facts, economics, and social policy . . . . [S]uch presumptions are the means by which we reach intelligible and consistent conclusions in the uncertain world of antitrust . . . . [T]hey guide the intellectual process of trying to reach intelligent, disciplined, and consistent conclusions in an untidy universe.[24]

Justice Black, speaking for the Court in *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958), described the importance of per se rules thus:

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[23]The statistical report of Professor Peter Gerhart for the NCRALP revealed the following facts about the IBM litigation (current as of December, 1978): The government produced approximately 26 million pages of documents; IBM produced about 65 million pages. More than 1,300 depositions were taken. In its first three years of trial, the case generated a transcript of 84,586 pages, with 8,103 documents, totalling 211,756 pages, introduced in evidence. The government's litigation team numbered 35; IBM was estimated to have employed more staff, counting both outside and in-house counsel. Of course, the IBM matter was extraordinary, and major monopoly cases may often be more complex than vertical restraint cases. However, the NCRALP found the median total time for private antitrust cases reaching trial to be *44 months*. *Id.* at 3, n.1. This suggests that the problems of complexity and unmanageability are common to many, if not most, civil antitrust cases.

[24]2 Areeda & Turner, *supra*, Section 314b at 47-48.

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.[25]

The per se rules are also based partly on this Court's reluctance to rely too heavily on ever-changing economic theories. Justice Marshall noted in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972): "Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case . . . ."[26] He concluded:

> Should Congress ultimately determine that predictability is unimportant in this area of law, it can, of course, make per se rules inapplicable in some or all cases and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.[27]

Earlier Dean Bok had expressed this concern in more dramatic terms, warning of the difficulties courts may encounter when they:

> succumb to the economists who bid us enter the jungle of "all relevant factors," telling us very little of the flora and fauna that abound in its depths, but promising rather vaguely that they will do their best to lead us safely to our destination.[28]

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[25] *Northern Pac. Ry.*, 356 U.S. at 5.

[26] *Topco Associates*, 405 U.S. at 609, n.10.

[27] *Id.*

[28] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 227 (1960).

His observation is no less valid today.

This Court's opinion in *Sylvania, supra*, acknowledges that "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and on the judicial system [redacted] of reason trials."[29] The per [redacted] provides just such clear guidance in an area of continuing concern to businesspersons and the lawyers who counsel them.

Business planners want and need predictability in the legal environment. Planners of product distribution systems desire this clarity no less than other businesspersons. The per se rule provides those planners, and the lawyers and courts who must deal with them, something more concrete to guide them than economic theories that change with each new school of fashionable economic thought.

Per se rules in antitrust — like all rules of law — entail some costs. In the case of per se rules against price fixing, one of those costs is the occasional case where more perfect justice might be done by undertaking the incredibly complex analysis of purpose, power, effects, industry history and other factors mandated by the rule of reason. But this Court has long found those occasional costs worth bearing where price fixing is at issue.

Moreover, the costs entailed in treating vertical price fixing as per se illegal are clearly minimal, since only the most onerous restraint that a supplier can inflict upon a dealer (deprivation of the freedom to set one's own prices) is deemed to be illegal as a consequence of application of

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[29] *Sylvania*, 433 U.S. at 50, n.16. The Court also noted that "these advantages are not sufficient in themselves to justify the creation of per se rules." *Id.* However, in the instant case we are concerned not with the *creation* of a per se rule, but rather with the *preservation* of a per se rule which has been "established firmly for many years." *Id.* at 51, n.18.

the per se rule. A supplier who, in fact, wishes to achieve legitimate ends by vertical control can invariably do so by more direct and less economically restrictive means than by resale price fixing. In the real world, if a manufacturer truly wants "its distributors to provide costly promotional, warranty, or other ancillary services and thereby [to] increase the attractiveness of the product,"[30] to eliminate the so-called "free rider" effect (as argued by the government), then the manufacturer can obtain those services in a feasible alternative to price fixing by simply and directly contracting for them.[31]

How could higher prices, without more, ever assure that all sellers would promote and service the product exactly as the supplier wishes? Common sense is not rebutted by the unsubstantiated speculation of the "anti-free-rider" school. The obvious abundance of business alternatives to vertical price fixing that are less restrictive of competition has been emphatically noted by antitrust scholars who have published views supporting the per se rule.[32]

This Court has long recognized the utility of a "less restrictive alternative" standard and has applied it in a variety of settings. Examples include regulation of expression[33] and *economic* regulation.[34] The "less restrictive alternative"

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[30]Brief for the United States, at 21.

[31]Pitofsky, *supra*, at 52-53.

[32]Sullivan, *supra*, at 382-387; Pitofsky, *supra*, at 52-53.

[33]*See, Shelton v. Tucker*, 364 U.S. 479 (1960).

[34]*See, Dean Milk v. City of Madison*, 340 U.S. 349 (1951). Indeed, this Court's opinion in *Sylvania, supra*, balancing the benefits and burdens on intrabrand vs. interbrand competition can be construed as supplying a form of "less restrictive alternative" test in which "the elimination of intrabrand competition . . . was, in essence, the lowest price that the marketplace could pay for making Sylvania a viable interbrand competitor." Disner, *The Rule of Reason: Fudge Factor in Antitrust Law*, L.A. Daily J., Rep. No. 79-13, July 13, 1979, at 4, 7. Note that the location clause in question did not prevent *price* com-

approach can be applied with equal utility to check the type of private economic regulation by suppliers which the government apparently now wishes to abet.

It cannot be shown that *any* of the goals touted by the government as legitimate aims of resale price fixing need be achieved by alternatives as restrictive as freezing the vital element of price. Thus, the only real "cost" of the application of the per se rule against vertical price fixing is to require suppliers to use less restrictive, even if still *quite* restrictive, means of vertical control. Those less restrictive means of vertical control can then be measured under the rule of reason, if at all.

In light of the extensive precedent for, and common sense underlying, the per se ban against vertical price fixing, the burden should be on the proponents of a rule of reason approach to demonstrate that the benefits of that approach outweigh the aggregate of its enormous procedural costs and the potential competitive harm of the practice itself. We submit that the proponents have not met and cannot now meet that burden.

Abandonment of the per se rule will plunge the courts, counsel, and the business community into constant uncertainty regarding one form of price fixing. Antitrust counselors, including many members of this Association, already face considerable difficulty in explaining to laypersons the present rule against all forms of price fixing. Today, however, a lawyer can at least answer a clear "no" to the question, "May I agree on or fix prices with others?"

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petition for Sylvania T.V. sets there. *See*, opinion of the Ninth Circuit affirming the decision of the district court on remand, *Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*, 694 F.2d 1132, 1137-1138 (9th Cir. 1982) *aff'g*, 461 F.Supp. 1046 (N.D. Cal. 1978). In fact, the District Court in *Sylvania* on remand applied a "least restrictive alternative" test in dismissing Continental's complaint. 461 F.Supp. at 1052.

Under the government's proposal, counselors will be left with the task of explaining that the answer is "maybe" and depends on the distinction between horizontal and vertical relationships and on all the factors that make up rule of reason analysis. Few businesspersons and fewer practicing antitrust counselors will welcome this plunge into the jungle of "all relevant factors."

The result of abandoning the per se rule will be more of the gargantuan and costly economic inquiries about which the Court warned in *Northern Pacific Railway, supra*. Less will be gained in identifying the rare defensible use of price fixing than will be lost in many fruitless and costly inquiries.[35]

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[35]The government also argues that this Court's distinction in *Sylvania, supra*, between price and non-price restraints is unworkable. (Brief for the United States, at 12-13, 19; Brief for the United States (Petition for Certiorari), at 13-14. Courts have readily dealt with this distinction in prior cases without undue difficulty.

For example, In *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978), the First Circuit applied the *Sylvania* standard to allegations that a scientific instrument distributor had imposed a combination of territorial and price restraints on an instrument dealer. The court easily distinguished between a price scheme designed only to serve territorial goals and a price plan free of nonterritorial aspects. *Id.* at 885-886. *See also, Pitchford Scientific Instruments Corp. v. PEPI, Inc.*, 435 F.Supp. 685 (W.D. Penn. 1977), decided just after *Sylvania*, in which the trial court readily differentiated among price and non-price restraints, finding that the alleged territorial restraints were ancillary to price restraints, and thus were subject to per se analysis. In practice, the price/non-price distinction is a rather narrow issue of characterization similar to many such issues in antitrust. Pitofsky, *supra*, at 52-53.

We see no insurmountable difficulty for the courts in such an analysis. It is most unlikely that courts will find "rambles through the wilds of economic theory" in the rule of reason easier than the narrow analysis of price vs. nonprice character as undertaken in *Wild Heerbrugg, supra*, and *Pitchford Scientific, supra*.

## II.

## CONGRESS IS THE APPROPRIATE FORUM FOR THE DEPARTMENT OF JUSTICE PROPOSAL TO MODIFY THE PER SE RULE.

### A. Congress Has Recently Expressed Its Approval of the Per Se Rule in Repealing the "Fair Trade" Laws.

The intent of Congress, reflected in its passage and subsequent modification of the Sherman Act, is the touchstone for interpreting the Act.[36] Congress has recently expressed direct approval of the per se status of vertical price fixing in its 1975 repeal of the "fair trade" laws, the Miller-Tydings and McGuire Acts. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, Section 2, 89 Stat. 801 (1975). In repealing "fair trade," Congress expressed unambiguous opposition to vertical price fixing in general.

Virtually all of the extensive reported comments on the repeal legislation are to this effect. A brief sampling of the remarks of the bill's principal sponsors demonstrates the intent of Congress regarding vertical price fixing. The bill's original sponsor, Senator Edward Brooke, described the "major distortions" of our economy resulting from vertical price fixing as: "First, artificially high prices; second, restraint of innovation and efficiency; and third, an increased reliance on costly promotional devices that increase prices."[37]

The Report of the House Committee on the Judiciary, submitted by Committee Chairman Peter Rodino, discussed *Dr. Miles Medical, supra*, and its progeny at length and

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[36] *See, generally*, 16 J. Von Kalinowski, *ANTITRUST LAWS AND TRADE REGULATION*, Section 2.01 (1983 ed.).

[37] 120 CONG. REC. S. 20361, S. 20363 (daily ed. Dec. 3, 1974) (Remarks of Sen. Edward W. Brooke introducing S. 4203, 93d Cong., 2d Sess.).

approvingly, with clear reference to the fact that vertical price fixing "is *per se* illegal under section 1 of the Sherman Act."[38] The Report offered a detailed critique of the harmful effects of resale price maintenance, concluding that such activities "contribute little but artificially high prices for consumers" and also "facilitate horizontal price fixing by manufacturers."[39] The Report also summarized a number of studies to the same effect. Most notably, the Report cited two studies, by the same Antitrust Division presently supporting Defendant/Petitioner in this matter, which demonstrated that *prices up to 37.4 percent higher resulted from resale price maintenance activities.*[40]

The co-sponsor of the Consumer Goods Pricing Act in the House of Representatives, noted that, absent the fair trade statutes, vertical price fixing arrangements "would be per se violations of the antitrust laws."[41] She urged their return to that status, having noted remarkable unanimity for repeal among the courts, the antitrust agencies, (including the Antitrust Division), consumer groups and large segments of the business community.[42]

The final absolute repeal of "fair trade" passed both houses with virtually no opposition[43] and was signed into

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[38]H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 1-2 (1975).

[39]*Id.* at 1.

[40]*Id.* at 3.

[41]121 CONG. REC. H. 7103 (daily ed. July 21, 1975).

[42]*Id.*

[43]Congress, in addressing the issue of the "fair trade" laws, considered and rejected two proposals with content similar to aspects of a rule of reason analysis. The first of these was a proviso which would have allowed maximum price fixing for newspapers. *See*, Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. Pts. 1-2 (1975) [hereinafter cited as 1975 Senate Hearings]. A second alternative would have allowed vertical price fixing in cases of new companies or products. *Id.* at 75-92; *See also*, Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 House Hearings]. Neither proposal was adopted by either the Senate or House committee. 1975 Senate Hearings; 1975 House Hearings.

law on December 12, 1975, by President Ford, who had enthusiastically supported the repeal.[44]

Thus Congress reviewed vertical price fixing activities, in the context of repealing the "fair trade" laws, and had a clear opportunity to abandon the per se standard or provide for "reasonable" exceptions to the standard. Congress instead chose complete repeal and consciously returned the law to the preexisting per se rule, without exceptions. This is a remarkably clear signal of Congressional intent regarding vertical price fixing. The Department of Justice should not now blithely brush aside that intent.

**B. The Department of Justice Proposal Is Essentially Legislative in Nature and Should Be Addressed to Congress.**

The Department of Justice, under the current Administration, has changed its position on vertical price fixing activities from that of thirteen prior Administrations (seven Republican and six Democratic). The Department testified and lobbied actively *against* resale price maintenance in the 1975 Congressional hearings on the repeal of the "fair trade" laws.[45] However, the *current* Assistant Attorney General has made clear his intention to direct litigation resources of the Antitrust Division toward achieving the abandonment of the per se rule against vertical price fixing.[46] It has also been reported that the Antitrust Division is currently con-

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[44]Statement By President Gerald R. Ford Upon Signing the Consumer Goods Pricing Act of 1975, 11 WEEKLY COMP. PRES. DOC. 1367 (Dec. 12, 1975).

[45]*See*, 1975 Senate Hearings at 16-21 (testimony of Thomas A. Kauper, Assistant Attorney General, Antitrust Division); 1975 House Hearings at 109-21 (testimony of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

[46]*See*, Congress Objects As Administration Seeks Relaxation of "Vertical Price-Fixing" Ban, *Wall Street Journal*, May 16, 1983, at 14, col. 1.

sidering a legislative proposal which would achieve the same result.[47]

While most authorities are in accord with the view recently expressed by Justice White in his dissent in *Bankamerica Corp. v. United States*, 51 U.S.L.W. 4685 (1983) that there is no formal rule of administrative *stare decisis*,[48] the majority in *Bankamerica* held that a long-standing apparent interpretation of an antitrust statute by the Antitrust Division was entitled to considerable weight in evaluating a new enforcement philosophy espoused by the Division.[49] The Court then rejected that new enforcement policy (regarding interlocking directorates). Similarly, Justice White noted that if the FTC or the Antitrust Division adopts an interpretation of an antitrust statute, and then changes that interpretation, "the present interpretation would not be entitled to the usual degree of deference, since it [is] inconsistent with [the] previous view."[50]

Clearly, the Antitrust Division may change its views. But the weight given to a novel proposition, such as the proposed abandonment of the per se rule here, should be less than usual, in light of 70 years of generally consistent Antitrust Division interpretations to the contrary.

More significantly, given the recent Congressional approval of the per se rule, the rule is most appropriately reconsidered — if at all — by Congress. A useful analogy may be found in this Court's reasoning regarding the an-

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[47]*See*, 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1098, at 105 (Jan. 20, 1983).

[48]51 U.S.L.W. at 4693 (dissenting opinion).

[49]*Id.* at 4688 (majority opinion).

[50]*Id.* at 4693 (dissenting opinion) (citing *Bowsher v. Merck & Co.*, 75 L.Ed.2d 580 (1983) (White J., concurring in part and dissenting in part); *General Electric Co. v. Gilbert*, 429 U.S. 125, 142-143 (1976); *Morton v. Ruiz*, 415 U.S. 199, 236-237 (1974)).

titrust exemption for organized baseball in *Flood v. Kuhn*, 407 U.S. 258 (1972). There, this Court chose to uphold a 50 year old precedent exempting baseball from the antitrust laws on the rationale that Congressional inaction, taken in context, showed the intent of Congress to allow the exemption. "We continue to be loath . . . to overturn those [early] cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."[51]

The argument for such an interpretation is even stronger in this matter. Congress has recently indicated positive approval of the per se rule in vertical price fixing cases. The Department of Justice should be most reluctant now to urge and this Court to accept reversal of a long-standing antitrust doctrine for which Congress has showed recent support.[52]

As the issue of the continued vitality of the per se rule was not certified in this matter, the issue need not be decided at all on these facts. Given the legislative nature of the Department of Justice proposal, judicial deferral here may prompt the legislative proposal and Congressional consideration that is most appropriate for this policy matter.

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[51]*Flood v. Kuhn*, 407 U.S. at 283-284.

[52]The government embraces *Sylvania, supra*, as an example of the authority of this Court to modify its prior antitrust standards. Brief for the United States, at 20, n.29. While the Court certainly has authority to modify its standards, it exercised that authority in *Sylvania* under very different circumstances than those presented in the instant case, since in the area of non-price restraints there had been no recent expression of Congressional intent parallel to the repeal of the "fair trade" laws in this case. *See, Sylvania, supra*, 433 U.S. at 51, n.18 ("No similar expression of Congressional intent exists for non-price restraints."). Moreover, the precedent overturned in *Sylvania, United States v. Arnold Schwinn Co.*, 388 U.S. 365 (1967), had endured for but ten years, and was thus hardly an established rule of law on the same footing as the per se rule against price fixing, which is the product of seven decades of judicial scrutiny, congressional approval and academic discourse.

**Conclusion.**

The Court's firmly established rule against vertical price fixing promotes the efficient administration of justice in antitrust matters and comports with recently-expressed Congressional intent. This Court should reject the Department of Justice invitation to abandon the rule.

Respectfully submitted,

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